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Convention on Cultural Diversity

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Abstract

In the Fall of 2003, UNESCO will consider the introduction of an international agreement on cultural diversity. Proponents of this convention view the commitments made by countries in trade agreements as weakening the ability of countries to pursue domestic policies to preserve and promote cultural diversity. We review the existing draft wording for a convention and conclude that it fails to meet the necessary conditions for an enforceable rules-based international agreement. Countries are given rights to introduce policies that promote cultural diversity but have no clear obligations. What constitutes cultural diversity is self-defined by each member country. When there is a clash between countries in the exercise of rights, no effective dispute resolution mechanism has been set out. No procedure is outlined to determine how commitments made in other trade agreements, such as the WTO affecting cultural goods and services, will be managed. The requirements for developing an effective dispute resolution mechanism are absent. In our view, a sectoral agreement within the WTO is a more promising route to follow.

1. Introduction

International trade policies evolve along an irregular path. Decisions are intermittently made that determine the trajectory until another critical day of reckoning changes the dynamics. Through the numerous critical turning points of the post World War II international trade structure, culture has remained a contentious area in trade governance. In 2003, governments face a fork in the road concerning the framework within which artists, performers and technical professionals will move around the world and movies and television programs, books, magazines and recorded music will reach viewers, readers, and listeners. In broad terms the choice lies between more fully incorporating these cultural activities in the WTO with appropriate safeguards for their distinctiveness or creating a new international instrument oriented to furthering “cultural diversity” that would fully embrace cultural activities and condition international agreements oriented to other goals.

Currently, the proposal for a new approach rests with UNESCO. Its Director General has recommended that the Executive Board place on the agenda of the 2003 UNESCO General Conference the development of a legal instrument on cultural diversity. If the Conference approves the recommendation, “a preliminary report, possibly accompanied by a preliminary draft convention, could be submitted to the General Conference at its 33rd session in the autumn of 2005” (UNESCO Executive Board, March 12, 2003).

In the following sections we outline the context for the diversity proposal, the draft wording that has been provided and our evaluation of it. The overall context reflects an ongoing tension between those who view trade liberalization as being beneficial to the promotion of creative endeavors and cultural diversity and those who see diversity as requiring a protectionist shield.

1.1 Cultural governance: GATT (1947), the EU, CUSFTA and NAFTA

An early recognition of culture’s distinctiveness was the provision for countries to include screen quotas for films in Article IV of GATT (1947). While the original member countries used an additional array of protectionist measures, no formal GATT actions were initiated against these policies before the creation of the WTO. Instead, bilateral

disputes about film policy between the Motion Pictures Association of America and a variety of governments proliferated. After the passing of its 1974 Trade Act, the United States government, often in close association with industry and labor unions, increased its unilateral actions against countries with policies that denied it rights under trade agreements or “unreasonably” restricted U.S. commerce. Copyright laxity and discriminatory cultural policies have been prominent targets of such “section 301” actions. The evolution of this process of American prosecution, adjudication and policing outside of GATT was accompanied by the decentralized development of a dense patchwork quilt of bilateral co-production film treaties among countries other than the United States. The co-production treaties granted mutual access to markets and to subsidized finance.

Innovations and adaptations introduced in post-war regional integration regimes have also had a significant impact on the evolution of cultural trade. European countries pioneered bilateral film co-production treaties, in part as a response to shortages in foreign exchange following World War II, but also to encourage the longer-term reconstruction of their industries. Cultural trade did not receive special attention in the European Community (EC) until the Television Without Frontiers Directive of 1989 (amended in 1997), which created a common production and distribution market for television programming. The EC policy set a majority quota for the hours (excluding the time appointed to news, sports events, games, advertising) of European productions to be carried by broadcasters of member countries (Article 4(1)). The Directive also required that European producers, independent of television broadcasters, supply at least 10% of total programming and that television stations not show films until a prescribed time has passed after their release in movie houses.¹

The introduction of quotas was not an innovation. Canada, for example, had introduced television quotas almost two decades earlier. The title of the Directive reflects its innovative component--the emphasis on liberalization of cultural trade within the Community. Concerns that this liberalization would homogenize Europe, blur cultural identities, and stifle the freedom of artistic expression within the broad boundaries of the EC were not persuasive. The mandated quotas are for European content, which has expanded to cover a broader physical and cultural area, and not for national content.

Culture was dealt with differently in the later and less comprehensive economic integration of North America. In the discussions leading to the 1988 Canada-United States Free Trade Agreement (CUSFTA), Canada announced that culture was off the negotiating table. Four commitments were nonetheless included in CUSFTA, as well as wording that “otherwise” exempted the cultural industries from provisions of the agreement. To exempt in this context is not to quarantine, as the next article of the CUSFTA sanctions retaliations in response to the imposition of restrictions on cultural trade.

After the CUSFTA was absorbed into North American Free Trade Agreement (NAFTA) in 1994, its opaque provisions of exemption and retaliation continue to govern the cultural trade relations of Canada with the United States and Mexico. The Mexico-United States cultural interface differs significantly. Mexico perceived an opportunity from open access to the Hispanic audience in the United States and the American negotiators were unenthusiastic about accepting a further cultural exemption. The governance of cultural trade between these two countries under NAFTA has the same structure as that of other sectors.

Since 1988, Canada and the United States have resolved a steady stream of cultural disputes outside of the resolution mechanism of either the CUSFTA or its successor, NAFTA.² Each of these disputes was a highly politicized bilateral conflict. Surprisingly, given some of the early apprehensions, Mexico and the United States have also not referred any cultural disputes to a NAFTA panel. Inclusion has not meant more bitter conflict nor has it meant homogenization. A greater percentage of Mexicans speak some English and vice-versa in the United States as compared to the pre-NAFTA era. These trends have diversified, not narrowed, cultural alternatives in each country. There remains an almost unprecedented diversity of choices by individual Mexicans and Americans within this broadened menu.

Concerns over cultural issues have been voiced on both sides of the Rio Grande since NAFTA, but given the differences in language and way of life these have been remarkably low key. The annual reports of the United States Trade Representative (USTR) reflect the different cultural tension between Mexico and the United States and between Canada and the United States. In its most recent country reports, the USTR

expresses a general concern with copyright enforcement in Mexico and with domestic dubbing and printing requirements. In contrast, the USTR identifies a number of specific irritants concerning broadcasting, copyright, foreign investment, tax and administrative policies with respect to cultural activities in its report on Canada (USTR Trade Barriers Report 2003, Canada and Mexico sections). The USTR also identifies each year two groups of countries that have not granted "adequate and effective" intellectual property rights protection or "fair and equitable market access" to U.S. intellectual property holders. Grade A sinners are put on the priority watch list; grade B ones on the watch list; copyright angels are not listed. Canada received a sinner's B in each of the past four years while Mexico has sported a halo. The contrast is also reflected in cultural relationships between Mexico and Canada. There was little sustained cultural interchange between Mexico and Canada in the cultural industries and arts before NAFTA. There is little now, while the intensity of interaction between the United States and Mexico has expanded considerably.

1.2 Cultural goods and services under the WTO

At the international level, the creation of the WTO represented a significant expansion in the 1947 GATT's scope, especially the inclusion of services trade, and a transformation in its structure. This sea change was augmented by special conventions that were subsequently negotiated for financial and telecommunications services, *inter alia*, within the WTO. On paper at least, the governance of the cultural sector was largely unaffected except for the WTO subsuming augmented Berne copyright obligations in the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS). The French government's insistence on maintaining the EC's audiovisual quotas almost undermined the Uruguay Round and was a catalyst for most countries not making significant audiovisual commitments in the General Agreement on Trade in Services (GATS).³ WTO members were required to reassess their commitments to GATS after five years experience. Shortly after that process began in 2000, it was absorbed into the Doha round of WTO negotiations. The opening requests and offers on services of a handful of WTO members that were publicly available as of May 1, 2003 reveal no greater willingness to open up the audiovisual sector than in 1994. This situation may change as more offers are

made and the negotiations proceed but at the moment there is little movement.⁴

Despite the failure to significantly liberalize cultural services in the Uruguay round of negotiations, significant progress has occurred in making culture a sector that is disciplined by WTO rules. This integration has occurred through two routes, one expected and one not. As anticipated, TRIPS has made the WTO the hub of copyright enforcement among developed countries. Secondly, the exercising of rights granted in the original GATT agreement, but not previously enforced, has also affected the cultural industries.

Consider first the surprising role of GATT (1947). A dispute arose in the mid 1990s concerning Canada's protection of its magazine market from foreign split runs (copies of foreign magazines sold in Canada carrying largely unchanged editorial content while adding advertisements targeting Canadian readers). At issue was the intention of Canada to reserve the Canadian advertising market for domestic magazines. In the past, if the United States responded, it would have done so bilaterally. Threats of a couple of tits for Canada's tat would have set off a negotiating process that would, if all went well, reduce the impact to a tit and a half. Instead the United States referred the dispute to the WTO. Each country appealed different aspects of the original dispute resolution panel decision. When the dust had settled, all three aspects of Canada's policies that were challenged--a prohibitive tariff, a discriminatory excise tax, and a postal subsidy for domestic magazines--were ruled inconsistent with commitments that were part of the 1947 GATT. The United States also brought an action against a 25% box-office tax levied on the exhibition of foreign but not domestic films by Turkey as violating Article III of GATT (1947). After initial negotiations were unsuccessful in resolving the dispute, the United States requested that a panel be struck. Before it met, the two countries reached a negotiated solution whereby Turkey made its tax nondiscriminatory.⁵

A series of copyright disputes adjudicated within the WTO under TRIPS further emphasizes the importance of the WTO to the cultural industries, writers, and artists. Before the WTO, copyright obligations under Berne were enforced in the less predictable world of bilateral actions as the formally provided mechanism of resolving disputes--appeals to the International Court of Justice--was never used. Politically messy bilateral confrontations were common. No body of precedents reduced the uncertainty of what the

international rules meant except for the lesson that bilateral power mattered.

The experience under TRIPS reveals an interesting dichotomy in the WTO's adjudicative and enforcement role. A large number of the post 1994 copyright disputes among the developed countries has been channeled through the dispute resolution mechanism of the WTO⁶ while the more powerful developed countries, particularly the United States, have dealt with failures by developing and transition countries to meet their copyright obligations through bilateral actions.⁷ In the former cases, the complaint typically concerns either not adopting or not enforcing the domestic legislation needed to conform to TRIPS. In the latter cases, the developed country addresses a broad failure by a developing or transition country to respect copyright bilaterally rather than proceeding with a complaint inside the WTO.⁸ The developed country frequently begins by threatening to withdraw aid programs and special access to its market. From this reference point, the developed country offers material aid and hands-on advice to aid the developing country in bringing its copyright regime closer to compliance.⁹

To summarize, a combination of four factors has brought significant aspects of cultural trade under the jurisdiction of the WTO and set important legal precedents:

- a revised dispute resolution mechanism,
- the old GATT and the new TRIPS,
- an organic view of the joint impact of the services and goods component of the WTO body of law in the emerging body of panel precedents, and,
- a willingness by the United States to pursue its interests within rather than outside the WTO, at least in some circumstances

With the launching of the Doha Round of WTO negotiations, some countries favor continuing to explore the liberalization of cultural services within the WTO, perhaps in a special agreement such as the telecommunications pact. This group lacks a formal organizational structure. Those countries wishing to avoid liberalization of cultural industries in the Doha round are, in contrast, promoting a new instrument on cultural diversity (NICD)¹⁰ to insulate their cultural policies from the impact of commitments made in trade agreements and technological change. At present, UNESCO is their venue of choice.

2. Developing and supporting the NICD

Over the past five years, the proponents of a NICD have created an organizational structure to develop its architecture and a strategy for promoting and financing its implementation.

2,1 The INCP

The lynchpin of the NICD campaign is the International Network of Cultural Policy (INCP), created shortly after the WTO came into being. The INCP describes itself as a forum for the cultural ministers of member countries to discuss issues of mutual interest.¹¹ Their discussions have focused on the NICD. The INCP has held five annual meetings since 1998 with a sixth to be held in Opatija, Croatia in 2003.¹² The membership has grown from less than 20 countries in 1998 to 53 at the end of April, 2003. Of these 53, twenty-five are from either the Commonwealth or the Francophonie.¹³ A small core of active members shapes the INCP's agenda while a larger set of passive members sporadically participates. Among the active members are those in its contact group--Canada, Croatia, France, Greece, Mexico, Senegal, South Africa, Sweden, and Switzerland (in alphabetic order)--that set policy direction and provide the administrative resources necessary to maintain continuity and build momentum. Some key members of the active group have diversified their bets. While their cultural ministries support the NICD, their trade ministries have contributed positively to a call for suggestions on how to broaden commitments in audiovisual services under GATS. Switzerland, a member of the contact group, and Brazil, a INCP member that attended its first four annual meetings, have submitted separate communications to the WTO on how to treat audio-visual services in the framework of the GATS.¹⁴ In contrast, the French and Canadian governments are two of the most consistently enthusiastic supporters of the INCP.¹⁵ They are on record that they will not participate in the liberalization of cultural trade and services until a NICD is in place.

The annual meetings of INCP Ministers of Culture are public performances. Much of the preparation for these meetings is done by working groups of professionals from member governments and consultants; a liaison bureau is located in Ottawa. The INCP's Working

Group on Cultural Diversity and Globalization has focused on the NICD.¹⁶ It has been meeting with increased frequency, as the WTO negotiations slowly gain momentum.¹⁷

2.2 The INCD

The responsibility within the Canadian government for developing a NICD is formally shared between the Department of Foreign Affairs and International Trade (DFAIT) and the Department of Canadian Heritage, which is responsible for “national policies and programs that promote Canadian content, foster cultural participation, active citizenship and participation in Canada's civic life, and strengthen connections among Canadians.”¹⁸

In practice, Canadian Heritage has provided the funding for the Canadian effort to promote a NICD. In 1998, Heritage commissioned the Canadian Conference of the Arts (CCA)¹⁹ to organize an international NGO to complement the efforts of the INCP, just before hosting its inaugural meeting.²⁰ The resulting International Network for Cultural Diversity (INCD) is an umbrella group for individual artists, cultural activists, and local or national cultural non-governmental organizations (NGOs) from different countries, including some that are not members of the INCP.²¹

In December of 1999, the INCD was active at the WTO’s ministerial meeting in Seattle bringing “cultural issues to the WTO meetings and counter-meetings, which galvanize the anti-globalization movement.”²² Since its first conference in Greece (2000), the INCD has held its annual meetings concurrently with those of the INCP and in the same locale. Both organizations have worked side-by-side to provide drafts of a NICD and to promote the concept.

The INCP represents the more constrained and calculated “political” side of cultural diversity while the INCD looks at the same issue with a broader and more unpredictable “civic” and “participatory” view. In this case, the official side has kept a tight rein on the “grass-root” input through funding its liaison office and many of its initiatives, integrating the INCD meetings with its own, and providing consultants or staff that develop themes, suggest speakers, write background papers and summary reports and proselytize. The intention is to release “soft power” through email campaigns, news coverage, talk-radio conversations, and the like that furthers the political agenda of the INCP.

2.3 The Cultural SAGIT

Firms, not-for-profit organizations, collectives, guilds, unions, and public enterprises producing cultural products and related services are also concerned about the international governance of cultural activities. A government would typically not promote a radical shift in international arrangements over cultural activities without their support. There are many formal and “thick” informal channels of communication among these local and national media and entertainment groups and government in every country. To represent the marshalling of support from this group for a NICD, we briefly draw on the Canadian experience.

In Canada, the Cultural Industries Sectoral Advisory Group on International Trade (cultural SAGIT) is one of 12 industry advisory groups to the Canadian Minister of International Trade. It consists of about 20 members appointed for two-year terms. At its meetings, officials from the Department of Foreign Affairs and International Trade and Heritage Canada meet with representatives from some of the cultural industries, lawyers and consultants to the industry, and academics concerned with trade policy.²³ The SAGITs for each industry work differently. Some seldom meet. The Cultural SAGIT is the only one to communicate publicly, publishing two reports, one in 1999 and one in 2002.²⁴

The international interests of organizations involved in content production, performing specialized roles in the distribution chain, or delivering content through retail or exhibition to the public vary within and across different media. For example, in Canada, producers of mass-market or specialized cultural audiovisual content generate a significant proportion of their revenues abroad; distributors of art house films depend on licensing foreign films, and indigenous book publishers are sustained by government subsidies and licensing rights to distribute books nationally that have been successful in foreign markets. These varied interconnections to suppliers and buyers in other countries differ from those of individual artists and performers, their NGOS, and the cultural activists that are represented by the INCD or the politically conditioned agenda of the cultural ministries and their bureaucracies represented by the INCP.

A variety of organizational linkages have supported the emergence of a more unified

view among the Cultural SAGIT, the INCD, and the INCP than might have been expected. The INCD is a creation of the INCP and cultural ministries sustain its existence. Among these ministries, Canadian Heritage, has been a prominent supporter. Some Cultural SAGIT members have provided leadership in sessions promoting the NICD at the annual meetings of the INCD. For example, Robert Pilon, who is the Executive Vice-President of the Coalition for Cultural Diversity (CCD), a domestic Canadian counterpart of the INCD, developed the case for a NICD at the first annual INCD meeting in Santorini, Greece (2000).²⁵ His explanation of this complex topic was persuasive. At the end of this three day conference, the INCD delegates supported “the implementation of a new international instrument that will give a permanent legal foundation for cultural diversity” and promised that the “(n)etwork will work with culture ministers, UNESCO and others to research and build consensus for the terms of this new international agreement.” Two other Cultural SAGIT members, Ivan Bernier and Peter Grant participated at the next INCD annual meeting in Lucerne (2001). The former delivered a paper on the NICD while the latter chaired and summarized the deliberations of a session on the NICD.²⁶

2.4 UNESCO

At the first INCP meeting in Ottawa the Canadian Minister for International Cooperation and Minister responsible for La Francophonie gave UNESCO credit for inspiring the formation of the INCP. UNESCO delegates have since participated in the INCP annual meetings and in the frequent meetings of its Working party on Cultural Diversity and Globalization. In late 2001, the General Conference of UNESCO adopted a Universal Declaration on Cultural Diversity. At the INCP meeting in Cape Town (2002), the Cultural Ministers in attendance agreed to embed the NICD in UNESCO.²⁷ A request by France, Germany, Greece, Mexico, Monaco, Morocco and Senegal, supported by the Francophonie countries in UNESCO, asked the Executive Board of UNESCO to recommend the sponsoring of a NICD. The Secretariat reported favorably on this proposal (UNESCO Executive Board, March 12, 2003) and in the autumn of 2003, the General Conference of UNESCO will deliberate on the development of a legally enforceable instrument on cultural diversity. No other international organization has

participated in the meetings of the INCP or the INCDC. UNESCO currently houses a legal convention covering illegal trade in cultural property,²⁸ the Florence Agreement (1950 as modified by the Nairobi protocol 1976) governing the importation of educational, scientific and cultural materials, the Universal Copyright Convention (UCC, 1952),²⁹ some specialized copyright accords, and the Rome treaty addressing neighboring rights (1961 jointly administered with WIPO).³⁰

3. The NICD proposals

The INCDC has presented its members with a series of NICD drafts and the SAGIT has submitted its NICD proposal to the government and the public. The INCP released its first draft at the Cape Town meetings in the fall of 2002. It is currently working on an update with a new drafting team. If UNESCO decides to sponsor a NICD, it will build on these three proposals. A NICD must be consummated or be a looming certainty in the near future for its supporters to achieve one of their goals –persuading more countries to not make any concessions in audiovisual services during the Doha round by offering them an alternative convention. The pace in the NICD campaign has therefore quickened. In introducing its latest draft, the INCDC remarked: “What is most remarkable about these three initiatives is how much they have in common. It is unusual to find that governments, civil society and key business groups agree on an important international legal initiative” (INCDC, 2003). To those following the issue, there is little remarkable in this similarity given the overlap in sources of advice on content and drafting.

Each of the drafts claims to be a framework for a rules-based international agreement governing cultural trade that is enforceable. Their authors vigorously assert that they are presenting much more than declaratory statements of a moral position. Our first task is to assess this claim. We refer to each draft as of a certain date but are cognizant that new drafting and wording is currently taking place.³¹ We do not expect that there will be major changes to substantive provisions of the proposed agreement, but the proponents will have to come to grips with the paucity of enforceable rules, the relationship between the NICD and the WTO and dispute resolution.

3.1 Necessary conditions for an enforceable rules-based international trade agreement

The rules of an international agreement specify a member's rights and obligations. Rights allow a member to do something valuable while obligations require a member to do something costly. For example, in GATT (1947) traders of a member country have a right to access the market of another member subject to paying tariffs that do not exceed a specified level and are no higher than those offered to traders of any other country. Each member country incurs the complementary obligations of establishing an upper bound on its tariffs and offering most-favored-nation treatment. Typically, qualifications and exceptions noted in the agreement condition its rights and obligations. Enforcement of obligations is necessary for obtaining compliance. In the GATT example, the concern is not that a country's traders will offer to pay the custom's officials of other countries more than the published tariff, i.e., that they won't exercise their right, but that a member's government will charge a higher tariff than it promised to assess, i.e., that it won't meet its obligations.

International trade treaties differ from domestic laws in a number of dimensions. They share some features of a contract since their rights and obligations pertain only to member countries. Their enforcement however differs. A contract can be referred to national courts if there is a breach. Since there is no credible equivalent internationally, trade agreements effectively depend on internally established dispute resolution mechanisms for enforcement. In the WTO, for example, the dispute resolution mechanism has been created to encourage compliance. The punishment to a country that fails to meet its obligations is a suspension of a "measured" portion of the obligations to the guilty country by the country (or countries) affected by the breach. A country that is found guilty by the adjudication process of violating the rules is asked to bring its policy into compliance. Only if it fails to right its wrong can the aggrieved country retaliate. For compliance to be encouraged, the expected retaliation, if sanctioned, must impose more costs on the guilty country than does complying with the rules. The sanctioned response must also be "credible," i.e., the aggrieved country should gain from imposing it if the delinquent country fails to comply. Otherwise the delinquent country would expect that

the penalty would not be levied if it did not comply. Enforcement also requires that non-compliance can be economically identified with sufficient accuracy to provide the desired discipline. Transparency requirements and rules that limit control instruments to those that are easy to audit, like tariff schedules, facilitate effective monitoring.

Economies of scope from sharing a dispute resolution mechanism may exist. Careful “bundling” of obligations may extend the domain of useful constraints. We illustrate with a stylized example. An agreement, call it X, generates more benefits for each member than is necessary to sustain a self-contained dispute resolution mechanism. Suppose that there exist sets of rules serving other causes, of which we will consider two labeled Y and Z. Each of these additional sets of rules generates potential benefits to the members of agreement X, but neither can sustain a dispute settlement mechanism (DSM) on a stand-alone basis. To be more concrete assume that XY and XZ are viable self-enforcing possibilities but that neither a fully embracing agreement (XYZ) nor an agreement joining the two additional causes (YZ) can sustain a DSM. The only viable expansion of X is to include either Y or Z but not both. Ultimately diseconomies of scope prevail as more obligations are added and the adjudication process has to cope with a more complex mix of violations. Net surpluses earned by members shrink and their distribution changes. Indiscriminate expansion of responsibilities can eventually destroy a viable agreement with limited objectives.³² Expansion of an established agreement will of course incur a cost and generate no gain if the added obligations are so vague that they cannot be adjudicated.

We also argue that international trade rules must be specified more precisely than domestic laws to be effective. A national government often relies on courts and interpretative departmental regulations to provide an evolving definition of domestic laws that is sensitive to shifting community values and responsive to experience.³³ The scope for effective exegesis is less under a trade agreement because the adjudicators face a more daunting task in determining the “community values” of a set of countries and lack the historical legitimacy of domestic courts to “make law.”

We explore the NICD drafts looking for the rules that establish enforceable rights and obligation. If such rules can be discerned, do they generate a distribution of net gains to potential members that would sustain an effective DSM on a standalone basis? If not

would the absorption of the NICD responsibilities under either UNESCO or the WTO result in an expanded agreement that incorporated the NICD and remained viable? We present summaries of the relevant aspects of the proposals with our attempts to answer those questions. We emphasize the INCP draft but introduce material from the most recent INCD draft and the SAGIT proposal where appropriate.

3.2 Cultural diversity as an overriding objective

All of the NICD drafts claim cultural diversity as an overriding objective. It is not to be traded off against other objectives. The INCP draft defines cultural diversity as:

“the plurality of cultures that coexist in the world. It implies on the one hand the preservation and promotion of existing cultures, and on the other hand receptivity to other cultures”.

The Cultural SAGIT does not venture to define the term³⁴ while the INCD would let each NICD country define what it means by cultural diversity.³⁵ Sometimes an objective is presented without cultural diversity explicitly mentioned. Article 2.4 of the INCP draft, for example, adds an objective to “reinforce international cooperation and solidarity aimed at enabling all countries, especially developing countries and least developed countries, to create and maintain cultural industries that project their own vision at the national and international level.” This statement does not imply a tradeoff among cultural diversity, solidarity or cooperation, as at this level of generality there is nothing necessarily inconsistent with these three concepts.³⁶

There are some parts of the drafts that fail to grant cultural diversity supremacy over other objectives. The INCP draft, for example, explicitly calls for balance between embracing international cultures and developing the local or national culture. This creates an implicit tradeoff within the concept of cultural diversity but its implication for enforceable rules is not developed in either proposal. No recognition is given in any draft that promoting cultural diversity in multi-cultural and multi-ethnic communities might empower dominant groups to impose constraints on minority groups in the name of promoting their self-defined view of cultural diversity. It is a considerable leap to faith to assume that a state with license to shape preferential policies among groups within it will necessarily pursue cultural diversity rather than assuage powerful political groups within

the society. All of the drafts require members to grant freedom of expression and protection of human rights, an aspect that we discuss below, but fail to recognize that such stipulations mean that cultural diversity is not a dominant goal.

3.3 Seeking an enforceable rule

3.3.1 In the cultural policy chapters of the INCP draft?

As preambles and lists of objectives are often vague, it may be unfair to dwell on them. Let us cut to the chase in our search for enforceable rules by examining Chapters 3 and 4 of the INCP draft that address domestic and international cultural policy respectively.

Five articles address domestic policy. INCP members can “determine in light of their own particular conditions and circumstances what measures are appropriate to ensure the promotion and preservation of cultural expression” (Article 13). The next four articles are a mix of prescriptive statements, which seem out of place in a document extolling cultural diversity and national sovereignty over policy. Article 14 asserts that maintaining shelf space for national cultural products is necessary for national cultural diversity and that each member should recognize this need in other countries. Each country should recognize that appropriate public financial support is “essential for the promotion and development of cultural expression” and that this is true for the “vast majority of states” (Article 15). Articles 16 and 17 promote the role of public institutions and independent cultural industries in pursuing cultural diversity.³⁷ These prescriptions lack the precision to be enforceable. Even if they were, it is difficult to imagine that one member could take action against another for failing: to set aside shelf space for its own cultural output, to provide sufficient public finance for content production, promotion, and distribution, and to adopt the recommended organizational structure for its cultural activities.

At the international level, countries are encouraged to negotiate co-production treaties, exchange best-practice information, recognize the importance of competition policy, promote cooperation in other international settings, and arrange cultural exchanges with less-developed countries (Articles 18-22).

We cannot find a single enforceable rule in either the domestic or the international policy chapters. Given the emphasis on diversity, there is a surprising number of “shoulds” relating not to human rights and freedoms but to how a country should finance and

organize its cultural activities and policies.

3.3.2 Implied in the Chapter on the Dispute Settlement Mechanism (DSM)?

The INCP draft provides two alternative suggestions for a DSM. In the first alternative, the parties are encouraged to reach a solution through discussion. If that fails a committee of experts publishes a decision. If the Council of the NICD approves³⁸ the member must comply. If the member is deemed not to comply, the aggrieved country may suspend its obligations to the delinquent country. In the second alternative, member countries with a dispute are obliged to first negotiate and then mediate. If no resolution occurs, the parties can choose compulsory arbitration or take the case to the International Court of Justice. If they choose neither a process of conciliation is initiated. An annex to the draft describes this option as modeled on the Convention on Biological Diversity. We have been unable to find any examples of the application of this DSM within that convention that are in the public domain. There is no information revealed about the enforceable rules that would be the subject of disputes in the discussion of either option.

3.3.3 Between the lines in the general principles?

Perhaps the general chapters or the preamble of the draft reveal something about enforceable rules. Chapter 2 of the INCP draft lists guiding principles. In addition to repeating some of the admonitions already noted, this chapter *counsels* members that cultural goods differ from mere commodities (Article 4), market forces alone cannot guarantee cultural diversity, public policy that is informed by civic participation is of vital importance for cultural diversity and that cultural rights provide “an enabling environment” for cultural diversity (Article 6). There are no enforceable rules hidden in this list. An obligation to grant citizens free speech could, however, be read into Article 8, which requires members to acknowledge that “cultural diversity cannot be expressed without ensuring the conditions for freedom of speech, freedom of information and free creative expression existing in all forms of cultural exchanges.”

Of course, freedom of speech needs to be defined if it is to be the basis of an enforceable rule. No country grants freedom of speech unconditionally and none to our knowledge explicitly grants artists more freedom than other citizens. No working definition of free speech is given in any of the drafts, but it is clear that many INCP countries would have

to alter their policies considerably to comply with any reasonable rule. Freedom House has published its assessments of press freedom in 2003. It ranks each country as free, partly free, or not free depending on its composite score.³⁹ Eight of the 53 INCP countries were rated “not free” and another twelve as “partly free”. The Francophonie has formally supported cultural diversity in its Cotonou declaration on cultural diversity in 2001.⁴⁰ Despite this endorsement, four of the countries that are members of the Francophonie and the INCP are currently rated “non free” and two more are judged to be “partly free.” For these six countries cultural diversity presumably does not require freedom of speech. The INCD went a step further in its draft by including support of free expression for artists as an explicit responsibility of a member country that is subject to its dispute resolution process: “dispute procedures will allow for the protection of individual and collective interests, as well as those of corporations including noncommercial rights such as freedom of artistic expression” (Article XIV.1.iii). Its draft does not define what constitutes freedom of artistic expression. The Cultural SAGIT makes the strong statement that “measures which abridge legal guarantees of freedom of expression” are not permissible but bowdlerizes this commitment by allowing each Member State to forge its own definition of free expression (Article VII).

3.4 Relationship of a stand alone NICD to other international agreements

The INCP draft makes two references to the relationship of the NICD to other international commitments of its members. Article 9 states that “(n)othing in this Convention shall derogate from existing obligations that Members may have to each other under existing intellectual property conventions.” Article 11 similarly clarifies that the NICD does not imply “any right to engage in any activity or perform any action infringing upon human rights presently guaranteed by international law, nor to limit their scope.” *The Universal Declaration of Human Rights* is cited as an antecedent in its preamble and European human rights conventions are singled out as a model for “the protection of the individual rights of the artist, which are analogous to basic human rights.” in its discursive section on dispute resolution. What standard for such rights would be enforceable is not addressed. As with freedom of expression, some current members of the INCP would find it difficult to meet reasonable standards in this

dimension.⁴¹

Some supporters of the NICD favor completely severing governance of cultural trade from the WTO. Pascal Lamy, the EU trade commissioner opposes such a carve-out, as does the American administration (Richardson, 2003).⁴² We assume that if a NICD comes into being it would overlap areas of governance covered by the WTO. Although the INCP draft does not address the relationship of its NICD to the WTO, the INCD makes the following statement in the preamble to its draft:

Under international law, the provisions of this Convention would be deemed to prevail over those of an earlier treaty relating to the same subject matter, but only as between States that are parties to both Agreements. For states that are not party to the Convention, a prior treaty (e.g. certain agreements of the WTO) will govern with respect to their relationships with all State Parties to that earlier treaty, including those that may also be Parties to this Convention. In other words, it is not open to the Parties to the Convention to assert the Convention's priority with respect to non-signatory nations with which they have pre-existing international obligations - namely those arising under the WTO, international investment treaties, and regional trade agreements. Therefore, until an international Convention on Cultural Diversity is concluded and ratified, the most important strategy for most nations seeking to protect cultural diversity will be to refuse to make further trade commitments that may undermine the objectives and ultimate effectiveness of the Convention.

We believe the implications of this hierarchy of authority runs counter to the intentions of those who support the NICD, as reflected in the last sentence of the quotation. For example, if France and Canada were members of the NICD, they could work out special cultural exchanges and policies with respect to each other. These would, however, be subject to the MFN clause of the WTO for its members that choose not to join the NICD. As a result, organizations or individuals from other members of the WTO, in particular from the United States, which is not likely to join a NICD, would be eligible for any preferences granted by either France or Canada. The NICD then fails to make the discriminatory treatment of American content legal, which is one of its objectives.

On the other hand, the hierarchy of governance makes the NICD govern relations among its members, say between France and Canada. Suppose that in the future Canada had a dispute with France over, for purpose of illustration, measures in the other country favoring content in English dubbed into French within its borders. Since under the NICD each country can take whatever measures it deems appropriate, there would be no basis for legal action under the NICD and an effective spiral of retaliation could occur. Each step in the process would of course be publicly justified as contributing to cultural

diversity. These rising barriers would not apply to members of the WTO who were not part of the NICD to the extent that they ran counter to WTO obligations. The United States would almost surely take unilateral action if its interests were damaged or enjoy the irony if the conflict reduced the price of versioning their films for French-language markets.

The NICD would not give either Canada or France more freedom to adopt discriminatory measures in cultural goods and services against non-members than they enjoy in its absence. It would also remove existing WTO curbs on the imposition of protective measures that are effective only on other members. In addition, the suggested hierarchy of treaty obligations has some odd implications for members of regional integration pacts. If Canada and Mexico, who are both members of the INCP, joined the NICD, the interpretation indicates that the NICD trumps Canada's "exemption" in the NAFTA.

The cultural SAGIT notes that "WTO members will be conducting negotiations on the relationship of WTO agreements and multilateral environmental agreements" and concludes that similar negotiations can be expected between relevant trade agreements and a NICD. It is not clear that the parallel holds or on what basis negotiations would proceed. Environmentalists don't want each country to be able to do its thing with respect to the environment. It is our understanding that they do not want the WTO to say the "right" words about the environment, but to adapt its DSM to enforce measurable commitments made in multilateral agreements, such as the Kyoto accord. The same cannot occur with respect to cultural diversity until enforceable rules are placed on the NICD negotiating table.

3.5 Embedding the NICD in UNESCO

The INCP's Working Group on Cultural Diversity and Globalization established a Special Policy Research Team (SPRT), headed by The Swiss Federal Office of Culture to investigate whether the NICD should be a stand-alone agreement, embedded in UNESCO or within the WTO. The SPRT concluded that on balance a stand-alone agreement was the best option.⁴³ The INCP's draft agreement takes no position on this issue. Some core members of the INCP and the Francophonie have pressed the case for the NICD to be embedded in UNESCO after the publication of the INCP draft in October of 2002. At the

Ministerial Meeting of the Working Group on Cultural Diversity and Globalization of the INCP, held in Paris, February 5-6, 2003, the INCP announced that it would support the absorption of the NICD under UNESCO. In our assessment, the cultural heritage conventions or other related agreements currently administered by UNESCO have not generated the surpluses among members to sustain effective enforcement mechanisms for their current obligations. Combination with them would weaken, not strengthen, the ability of the INCD to support an effective DSM. Of course, that failure is not significant if, as we have concluded, there are no rules to enforce.

4. Conclusion

The NICD proposals allow each member country to adopt whatever policies it deems appropriate as long as it takes into account the cultural needs of other member countries in doing so. Since each member judges the probity of its own actions, the NICD depends on moral not legal imperatives to discipline cultural trade relations. We expect that a member country of the NICD will not be deterred from retaliating against measures that discriminate against the works of its artists or creative organizations by an accompanying diplomatic note saying that the action is a balanced way of diversifying culture. A similarly phrased note will presumably accompany the retaliatory policies. If this expectation is correct, there will be a lot of bilateral bargaining to coordinate and discipline this “freedom” to shape cultural policy as each country sees fit. A complex and in our opinion inefficient web of bilateral accords will evolve. The United States, the unnamed target of the NICD, is unlikely to end up at a disadvantage if cultural trade is governed by bilateral bargains.

The largest losers in this world will be the cultural industries of small, developed countries. They are as creatively and organizationally sophisticated as large developed countries but they face a disadvantage in recapturing the high fixed costs of creating attractive content if they only have access to their own market. This loss is avoidable through trade liberalization for small countries that are part of large language markets.⁴⁴

With films, television programming, recorded music and book publishing, the success of the smaller country in a liberalized setting will not be revealed by focusing on the proportion of domestic content broadcast, shown on its movie screens or sold in its record

or book stores as compared to the proportion in larger countries of the same language group, which is the statistic frequently cited. With film, for example, the small country will import more content than the large country even when its balance of payments in licensing fees is zero. It will pay less in royalties for the rights to show a film in its smaller market than it earns on the smaller number of films it licenses at higher royalties to the larger market. The balance of royalties and fees in the balance of payments and not the proportion of domestic world-class content that is shown at home is the proper measure of how a small country's creative community is faring in an open world.⁴⁵

Small countries that are not part of a large language bloc are at a disadvantage in overcoming economies of scale even if trade is liberalized. They can reduce but not eliminate the disadvantage of the small domain of their language by extending their market through dubbing their more expensive film and television productions, translating their literature, and specializing in media that is not language dependent, such as music, photography, illustrations and painting. NICD proponents blame liberalization (globalization) for the plight of countries that are not part of the major language blocs, but without access to foreign markets the ameliorating responses that lessen the burden of having a language that is not spoken by a lot of people would not be available.

Another aspect of the debate over international governance of cultural relations concerns the long-run impact of protectionism on creativity and cultural development. Over a half-century after World War II, there have been very significant shifts in the countries that dominate in most industries. Automobiles, telecommunications equipment, and electronics provide excellent examples of the diffusion of leadership among established centers and the development of new ones. The sector experiencing the most intensive efforts to alter the pattern of dominance through protection, the cultural industries, has changed the least. The most concerned countries have added additional layers of insulation and made the government a not very silent partner in the industry. The United States does the opposite. It allows the sale of its cultural icons, eschews quotas, provides negligible direct industrial subsidies, decentralizes support for the arts, and welcomes an inflow of professional and creative talent. As Cowen (1998) concluded in assessing French film policy: "But contrary to popular opinion, cultural protectionism does not further cultural diversity. Protected artifacts often lose their artistic and competitive

vitality. Protection actually decreases an industry's chance of competing successfully in world markets.”

Article 28 of the INCP addresses Development Assistance. The first of four sections indicates its flavor: “Members shall cooperate in the development and strengthening of human resources and institutional capacities in cultural production for the purpose of the effective implementation of this Convention in developing and least developed country Members, including through existing global, regional, sub regional and national institutions and organizations.”

It is a misperception that the developing countries as a group experience a trade deficit in cultural goods. Ramsdale (2001) undertook a study for UNESCO based on the UN's Commodity Trade Statistics on trade in cultural goods. He found that for the developing countries in 1998, exports exceeded imports (US\$51.8 billion and US\$44.4 billion respectively), whereas in the developed countries the reverse was true (US\$122.5 billion in exports, US\$169.3 billion in imports). On a more detailed level, the study notes “the developed countries were net exporters in the categories of printed matter and literature and cinema and photography, while the developing countries were net exporters of fast moving goods like radios, televisions, sporting goods and games, and recorded music.” The balance of payments position varies among developing countries, but Malaysia (US\$5.7 billion), Mexico (\$5 billion) and China (\$13.3 billion), all members of the INCP, ran large surpluses on cultural goods trade for 1998, the last year for which data are available in the UNESCO study. The developing countries as a group and these countries in particular have a considerable stake in the further liberalization of cultural trade.

Freedom of expression, artistic and otherwise, encourages innovative content and new interpretations of the old that nurture our evolving cultures. The impact of these stimuli is limited if the innovations are not embedded in some technology and distributed widely. A good bookstore, video or DVD rental outlet, movie theatres, record stores, and the rapidly expanding television programming that is available over the air, from satellite, and on the Internet have been and are important vehicles for the dissemination of more varied content. Public institutions play a varying role in this process; public policy can be supportive of its development; but a changing array of private for-profit and not-for-profit organizations are also crucial players. The first two organizational forms are explicitly

extolled in the NICD drafts but the bulk of cultural linkages among countries and within them are either commercial or supported by commercial activities. The NICD proposals have little to say about the desirable international governance of commercial players that deliver many cultural products and services except for vague appeals to more effective competition policy. The most effective competition policy is to encourage competition. Giving a green light to protection in cultural activities is a move in the opposite direction. The position put forward in the NICD drafts is that unconstrained policy decisions by each government are in every country's interest. This is a particularly bizarre view in the cultural sector. In every country that we are familiar with, the cultural industries have a markedly closer relationship to the government than a typical industry. Support by the media and the artistic community is critical for attaining electoral success in democracies or for legitimizing incumbents in non-democratic regimes. International openness generally weakens a relationship between the cultural industries and the government that promotes protection of domestic interests, the extolling and subsidization of high-concept producers serving small audiences, the denigration of foreign-sourced mass market content as base and "commercial" unless domestic producers or guilds get a piece of the action. The resulting protection seldom serves the interests of all of the industry players. The more entrepreneurial realize that they will pay a price for protection at home in having their opportunities abroad restricted by the policies of other countries. This restless minority favors gaining assured access to foreign markets rather than cutting their creative cloth to fit a small and protected market. Under an NICD their influence will be even less potent than is currently the case.

One can only speculate about the payoff to the government of the implicit policy-making compact between the cultural industries and the government. The result for consumers of cultural services is however uncontestable. Trade in books, music, magazines, films, and television programming, which more than any other force has spread ideas among different cultures, will be less free and more discriminatory than it would be in its absence. As the NICD draft mentions, cultural goods do differ from other commodities, as life-saving medicines differ from chocolates, but this difference speaks to more not less openness. The hidden assumption behind giving the government and the industry the right to craft policy as they see fit is that individual readers, listeners, and viewers are

incapable of choosing the right cultural content under open policies. The government alters the menu through discriminatory and protectionist policies so that the individuals in the culture will make “responsible” choices.

The INCP has decided to ask UNESCO to house the NICD. Currently, UNESCO administers the Florence Agreement that binds countries not to impose import duties on scientific, educational and cultural books and periodicals. The NICD is an agreement based on an opposing premise. It would grant member countries a *carte blanche* to adopt protective measures over a broader set of cultural goods and services. Since the NICD does not have enforceable rules as now constituted, a UNESCO convention would be a declaration and not a legally enforceable agreement.

Even at this level, the initiative is misdirected, in our opinion. Cultural diversity is not a moral principle, a maxim that governs behavior, but rather it is an outcome. We strongly support rules that encourage tolerance of cultural developments that respect fundamental human rights—tolerance within restraints. In such a world, cultures would always be in a state of becoming, of taking form from literally millions of individual and group decisions, some conserving and others innovating.⁴⁶ Whether a tolerant environment generates cultural divergences or convergences at any moment in time is currently not measurable and of no great consequence for policy should it become so.

If enforceable rules emerge in a future NICD draft, we are unaware of any benefits for developing a complementary DSM from housing the convention at UNESCO. None of UNESCO’s existing conventions have developed effective dispute resolution mechanisms. If the members of the INCP are able to fashion enforceable rules governing the interactions among national cultural policies, the WTO is the logical organization to house it. An effective DSM exists. Adding more complex cultural trade obligations to its responsibilities will not significantly decrease its effectiveness.

We have argued that implementation of the current NICD alongside existing WTO commitments will reduce not increase the degrees of freedom of its members in framing their cultural policies. If this is so, it is hard to understand the rationale for the NICD initiative unless it was intended from the beginning as a strategic diversion to obtain a better bargain for its supporters in the Doha round. The whole exercise reflects the antipathy that some have in the successful operation of the WTO, and their implicit belief

that an anarchic arrangement for governing culture, disguised as a rules-based agreement, will miraculously promote cultural creativity and understanding. It will likely end up, after the expenditure of much time and money, as yet another statement in favor of exercising best efforts to support cultural diversity whatever that means.

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Endnotes

¹ Once they have met these conditions, member countries are free to fashion their own policies with regard to licensing, taxation, financing and regulation of program content. The European 50% quota is a minimum. A member country can establish a higher quota if they wish. France, for example, has a 60% European quota and a 40% national quota. The target is an open market within the EC but the present arrangements allow considerable national protection.

² A dispute over Canadian magazine policy was referred to the WTO for adjudication, as briefly discussed later in the paper. These past cultural trade disputes with the United States are discussed in Acheson and Maule (1999, 2001a, 2001b, 2001c). Current frictions include Canadian tax credit subsidies for what the United States calls “runaway” film and TV productions; book distribution by Amazon in Canada; retransmission of television signals over the Internet and continuing American concern that its artists and companies are discriminated against in the allocation of neighboring rights funds (Maule 2003).

³ Audiovisual goods and services represent the most important cultural sector in international commerce. Under the GATS, a country can decide not to liberalize a sector according to four modes of supply. Certain principles, such as most-favored-nation (mfn) treatment and transparency apply across all sectors, although a country is able to except an existing policy from meeting mfn requirements as in the case of television and film co-production treaties.

⁴ For discussion of the current negotiations on audiovisual services see Graber 1993 and Richardson 1993.

⁵ In its request for a panel the United States indicated the grounds on which it would challenge the Turkish tax: “Article III of the General Agreement on Tariffs and Trade 1994 (“GATT 1994”) prohibits Members of the World Trade Organization (“WTO”) from imposing internal taxes or other internal charges of any kind on imported products in excess of those applied, directly or indirectly, to like domestic products. Article III also prohibits the application of internal taxes or other internal charges to imported products so as to afford protection to domestic production.” (World Trade Organization. January 10, 1997). Article III was carried over from GATT (1947).

⁶ The following WTO dispute settlement proceedings involved copyright: US v Greece (EC) re enforcement of copyright on films and television programs (DS124, DS125), US v Ireland (EC) re copyright and neighboring rights (twice DS115 and DS82), EC and US v Japan re duration and other aspects of copyright in recordings (DS42 and DS28), and EC v US re copyright of music publicly performed in bars (DS160). Copyright holders were also affected by a change in national law applicable to copyright and other intellectual property by US proceedings against Denmark (DS83) and Sweden (DS86).

⁷ Numerous bilateral initiatives by the United States against developing or transition economies are documented in the USTR Reports of 1998 through 2002.

⁸ The approximately 30 least developed countries in the WTO were given 10 years to comply with TRIPS. The USTR has not to our knowledge taken bilateral action against any of these countries, which are extremely poor.

⁹ The USTR’s actions with respect to Honduras are illustrative of the sequence. They are set out in the *Fact sheet monitoring and enforcing trade laws and agreements*, published by the USTR on May 1, 2000 and in

its annual reports.

¹⁰ We use NICD to refer to an international cultural diversity instrument. In the paper we discuss a number of related draft proposals. Each of these has a different name that is given in the text or a footnote.

¹¹ Details of its operation are set out on its website http://206.191.7.19/about/index_e.shtml

¹² The first five were held in Ottawa, Canada (1998), Oaxaca, Mexico (1999), Santorini, Greece (2000), Lucerne, Switzerland (2001), and Cape Town, South Africa (2002).

¹³ Thirteen members belong to the Commonwealth and nine to the Francophonie; three INCP members belong to both the Commonwealth and the Francophonie. The Commonwealth had 54 members and the Francophonie 49 members at the end of April, 2003. These totals are not directly comparable as the Francophonie allows non-national governments to be members while the Commonwealth is limited to national governments. Canada has, for example, three memberships in the Francophonie, the federal government, Canada-Quebec and Canada New Brunswick.

¹⁴ Communication from Switzerland, GATS 2000: Audio-visual services. WTO. S/CSS/W/74. May 4, 2001 and Communication from Brazil, GATS 2000: Audio-visual services. WTO. S/CSS/W/99. July 9, 2001.

¹⁵ Canadian Prime Minister Jean Chrétien and French Prime Minister Lionel Jospin issued a joint declaration on the importance of cultural diversity in a world economy, December 17, 1998 that their countries would promote cultural and linguistic plurality and ensure that cultural goods and services are fully recognized and treated as not just any merchandise in trade. A similar declaration was made by Prime Minister Jospin and the Premier Lucien Bouchard of the province of Quebec on April 6, 2000. On May 22, 2003, Prime Ministers Chrétien and Raffarin issued a statement in support of “UNESCO's development of a legally binding international convention that sets out clear rules and enables all countries to implement policies for promoting cultural diversity from a perspective of international openness. The convention and its rules should promote the development of a multilateral trading system in a coherent manner which preserves and promotes culture, and ensures diversity by fostering international trade in a variety of cultural goods and services. Together with our trading partners, we will therefore ensure the complementarity of the UNESCO convention and the multilateral trade system.” (see Joint Statement on Cultural Diversity, PMO Press Office May 22nd 2003, Ottawa, Ontario or http://pm.gc.ca/default.asp?Language=E&Page=newsroom&Sub=newsreleases&Doc=jointstatementculturaldiversity.20030522_e, accessed May 30, 2003)

¹⁶ “At its first meeting (Ottawa, Canada in December 1999) it agreed to focus initial work on providing advice to Ministers on international policy responses to cultural diversity challenges and opportunities.” INCP Working Group on Cultural Diversity and Globalization, Discussion Paper for Ministerial Consideration: International Responses to the Challenges Facing Cultural Diversity (1), 29 September 2000. That focus has become even more intense in the intervening years.

¹⁷ Between December, 2002 and April, 2003, there were two meetings in Paris, France followed by one in Halifax, Canada.

¹⁸ From Heritage Canada mission statement at http://www.pch.gc.ca/pc-ch/org/mission/index_e.cfm.

¹⁹ The CCA is an independent, non-partisan organization and a registered charity that is Canada's largest arts advocacy group. Heritage Canada funded the CCA to organize a conference *At Home in the World: An International Forum on Culture and Cooperation* in 1998 to develop "an international alliance of NGOs to foster sectoral cooperation and grass-roots political support for the efforts of Ministers of Culture to preserve and enhance cultural pluralism and cultural diversity, to create an increased role for culture in international relations, and to deal successfully with international trade issues." (Final Report of the International Meeting on Cultural Policy: Putting Culture on the World Stage. Ottawa, 1998.)

²⁰ The Swedish Joint Committee of Literary and Artistic Professional (KLYS) contributed the guiding principles of the INCD (CCA Bulletin 27/00).

²¹ Details of the INCD are at <http://www.incd.net/incden.html>. The "suggested" membership fees are \$25 for an individual, \$50 for a local organization, \$100 for a national organization, and \$150 for an international organization. A few member governments have provided most of the financial and professional resources for its annual meetings and reports. In March 2003, the INCD had members from 70 countries. In 2002, the INCD received C\$150,000 from Canadian Heritage according to a spokesperson from the Canadian Conference of the Arts. On May 22, 2003, the Ministers of Canadian Heritage and Foreign Affairs announced \$75,000 in funding for the Coalition for Cultural Diversity. The funds are to help the Coalition create the International Liaison Committee for Cultural Diversity, a joint secretariat with the cultural industry alliance in France to promote cultural diversity internationally - http://www.canadianheritage.gc.ca/pc-ch/news-comm/cc030348_e.cfm accessed May 30, 2003.

²² From a section entitled "Our Story" on the INCD website <http://www.incd.net/about.html> as of May 3, 2003.

²³ The cultural SAGIT meets about four times a year and provides advice to the Minister on a confidential basis. Members are reimbursed for expenses by the government but not otherwise recompensed.

²⁴ The 1999 Report is available at <http://www.dfait-maeci.gc.ca/tna-nac/canculture-en.asp>. The 2002 Report is at http://www.dfait-maeci.gc.ca/tna-nac/sagit_paper-en.asp both accessed May 31, 2003. Maule was a member of the SAGIT for both reports; he signed the 1999 but not the 2002 Report in which it is not indicated that there is a dissenting view.

²⁵ Newsletter 6 of the International Network for Cultural Diversity. For the relationship between the INCD and the CCD, which were created about the same time, see Newsletter 21 of the International Network for Cultural Diversity (July 2002). The CCD issued a position paper on trade and culture: Pierre Curzi and Jack Stoddard (co-chairs) and Robert Pilon, Executive Vice-President, *Cultural policy must not be subject to the constraints of international trade agreements*. It is available at http://www.cdc-cdd.org/Anglais/Liensenanglais/framewho_we_are.htm. See also funding noted in fn. 21.

²⁶ Professor Ivan Bernier, formerly from the Department of Law, Laval University is also an advisor to the INCP and provides input for UNESCO: his input is published in UNESCO's *World Culture Report 2000* at pp.70-71, and a related joint publication is quoted by UNESCO (see website footnote 1 at p.3). His paper on the INCD website is entitled "A New International Instrument on Cultural Diversity: Questions and Answers," available at <http://www.incd.net/docs/Y.Bernier-eng.htm> accessed May 31, 2003. Peter Grant is a lawyer from McCarthy Tetrault in Toronto who represents associations and collectives in the Communications and cultural sectors - http://www.mccarthy.ca/en/lawyerprofiles/new_micro_query.asp?Employee_CD=2535 accessed May 31, 2003. See the INCD Conference report *Towards A Global Cultural Pact: Final Report* Lucerne, Switzerland. September 21, 2001 for more details of their contribution. It is available at

<http://www.incd.net/lucreport> - accessed May 31, 2003.

²⁷ The Ministers decided “UNESCO is the appropriate international institution to house and implement an International Instrument on Cultural Diversity. They noted the commitment of UNESCO to the broad objective of cultural diversity as contained in the "Universal Declaration of Cultural Diversity: a vision, a conceptual platform, a pool of ideas for implementation, a new paradigm" tabled at the World Summit on Sustainable Development in Johannesburg in 2002. Ministers welcomed the reference by UNESCO to the work of the INCP in that document.”

²⁸ Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Paris, 14 November 1970.

²⁹ Historically the United States engineered the creation of the UCC as an alternative copyright convention to Berne. Subsequently, the United States left UNESCO and after a sixteen year absence has recently rejoined. In 1988, the United States altered its international copyright policy, joined the Berne Convention and actively supported the absorption of Berne obligations in the TRIPS during the Uruguay Round. As a result, the UCC does not have the same relevance to international copyright that it once had.

³⁰ The International Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations, Rome, 1961.

³¹ The three drafts are listed in the References and are available at <http://www.incd.net/resources/papers.html> (accessed May 31, 2003)

³² The addition of TRIPS to GATT in the Uruguay round is an example. For some countries the surplus from membership, or at least the surplus earned currently given its level of development, fell from having to comply with copyright obligations.

³³ For an interesting study of changes in the interpretation of marital law as community assessments and the economic implications of the property rights in marriage altered see Knetch (1984).

³⁴ See 2nd paragraph of the preamble.

³⁵ INCD 2003: Definition 2. “Subject to the proviso that such measures are consistent with the objectives and purposes of this Convention, and conscious of the often unique characteristics of the social, linguistic, economic, educational, recreational, ecological and aesthetic values that are inherent to cultural diversity, nothing in this Convention shall be construed to limit the sovereign authority of a Party to define such terms and concepts as “culture”, “cultural diversity”, and “indigenous or national culture” in a manner it considers appropriate to the characteristics of its particular society.”

³⁶ This article is notable in referring only to the cultural industries. It also implies some limitation or tradeoff on cultural diversity as a goal for developed countries. If there is only one goal it cannot be anything less than especially important to all countries.

³⁷ "Independent cultural industries" refers to enterprises, which are not subject financially, creatively or in terms of ownership to majority control by large private companies and public service institutions. "Public service institutions" refers to organizations established and essentially publicly funded for the fulfilment of public service obligations with respect to culture and cultural diversity as conferred, defined and organized

by each Member State. (INCP 2002 Article 1).

³⁸ No rule for making decisions is given in the draft but in a separate commentary on each chapter that appears before the draft the INCP states: “An important question that arises here is how the Council should take its decision. Unanimity, because of its simplicity and clarity, would be an interesting solution. But another equally acceptable and more flexible solution would be decision by consensus as was the case in the GATT and is still the case in the WTO (except as otherwise provided). This is effectively the solution retained in the present Instrument.”

³⁹ Rankings for all countries are listed in Appendix A of Freedom House, 2003. In 2000, there were 3 fewer INCP countries rated as “free” (Freedom House, 2000).

⁴⁰ La Francophonie, IIIe Conférence ministérielle sur la Culture, Déclaration de Cotonou, 15 June 2001.

⁴¹ Five of the INCP countries—China, Cuba, Morocco (Western Sahara), Russia (Chechnya), and Vietnam—were listed among 19 other countries in Freedom House, 2003.

⁴² EU Commissioner for Trade Lamy, in a presentation to the European Parliament’s Culture Committee, Strasbourg, May 19-20, 2003, supported the idea for a treaty, but one that would not challenge WTO rules or carve-out the sector from the WTO. In general, an instrument as a stand-alone agreement receives support from officials from cultural ministries, and less support or opposition from trade officials.

⁴³ International Network for Cultural Diversity, Newsletter 22, August 2002.

⁴⁴ The impact of language on audiovisual trade flows is evident in the data on Canadian co-production budgets. Canada has treaties with 57 countries but the bulk of the action is with producers from other English and French speaking countries. In 2000-2001, of the total budgets of co-productions of C\$533.9 million, 57% was generated with partners from the United Kingdom, 28% with partners from France, and 8% with partners from Australia (See CFTPA, The Canadian Film and Television Production Industry Profile, 2002, p. 36).

⁴⁵ For example, Statistics Canada reports that in 2001 audiovisual receipts from foreign sources were 1929 while expenditures were 2159 (both in C\$million). Receipts grew at 18.6% per annum and payments at 14.5% per annum and the ratio of receipts to payments rose from 53% to 89% between 1991 and 2001. See SC 67-203, 2001. The ratios of Canadian films shown in cinemas is much lower (5% or less) while the percentage of television programming that was Canadian in the Fall survey of 2001 (SC Daily Dec. 2, 2002) was 39% (Since television programming includes news, sports and other shows that do not have an international market, this figure overstates the percentage of internationally traded programming that is Canadian).

⁴⁶ Proponents of a NICD typically view culture in static terms whereas cultures often evolve rapidly as is the case for immigrant societies such as the Caribbean islands, North America, and parts of South East Asia. Many European countries consist of persons with different cultural backgrounds with the composition changing as borders are redrawn; the arts have been one of the few beneficiaries of the mix created by nationalist political upheavals since the 1800s.